Supreme Court, U. S.
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No. 76-140

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

KENT CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and
JOHN H. IRVING, GENERAL COUNSEL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GERARD C. SMETANA,
BOROVSKY, SMETANA, EHRLICH
& KRONENBERG
2011 "Eye" Street, N.W.
Suite 800
Washington, D. C. 20006

Attorney for Kent Corporation

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KENT CORPORATION,
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v.

NATIONAL LABOR RELATIONS BOARD and JOHN H. IRVING, GENERAL COUNSEL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Kent Corporation ("Kent") hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. pp. 3a-25a) [1] is reported at 530 F.2d 612. The order of the federal District Court for the Northern District of Alabama (App. pp. 26a-34a) is not officially reported. The full text of the order is reprinted at 86 LRRM 2801.

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[1] "App." refers to the Appendix attached to this Petition.

JURISDICTION

The Judgment of the Court of Appeals (App. p. 1a) was entered on April 21, 1976. On July 16, 1976, Mr. Justice Powell extended Kent's time in which to file a petition for a writ of certiorari to and including July 29, 1976 (App. p. 2a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a Regional Director can preclude disclosure of a final opinion embodied in a written Final Investigative Report when the Director has not demonstrated that he did not adopt that Final Report in cases or portions of cases where his decision is not to proceed.

2. Whether Final Investigative Reports in cases or portions of cases where the agency's decision is not to proceed are disclosable under the Freedom of Information Act as "identifiable records" outside the scope of Exemption (b)(5).

STATUTE INVOLVED

The relevant provisions of the Freedom of Information Act (5 U.S.C. § 552) are set forth below:

5 U.S.C. § 552(a)(2) provides:

> "Each agency, in accordance with published rules, shall make available for public inspection and copying—
>
> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases; . . .

5 U.S.C. § 552(a)(4)(B) provides:

> On complaint, the district court of the United States in the district in which the complainant

> resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

5 U.S.C. § 552(b)(5) provides:

> This section does not apply to matters that are—
>
> inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

STATEMENT OF THE CASE

A. Introduction

To resolve the issues raised in this Petition, it is necessary to understand the powers of the Regional Director and the functions of the documents whose disclosure is challenged. Each of the Board's Regional Directors is empowered to investigate unfair labor practice allegations in his geographical area. Investigations are conducted by a member of the Director's staff who, upon completing the investigation, prepares a "Final Report". On the basis of the Final Report and the investigatory file, the Regional Director determines whether the allegations have merit. If he believes these allegations are meritorious, he has full authority to secure a settlement—even over the objection of the party who filed the

unfair labor practice charge—or issue a complaint and prosecute. If he decides the unfair labor practice claim lacks merit, he is empowered to dismiss the claim, unless it is voluntarily withdrawn.

The Regional Director usually prepares a memorandum called an "agenda minute" to memoralize his decision to proceed to complaint, to accept a settlement despite the charging party's objections or to dismiss the unfair labor practice allegations.

The agenda minutes prepared by the Regional Director may or may not expressly adopt or incorporate by reference portions of the Final Report. In any event, these agenda minutes contain decisions made in actual cases presenting specific facts and defined issues; accordingly, these minutes are perforce based upon the facts outlined in the Final Report. It is these objective facts that are necessary to explain the circumstances of the case and give meaning to the decision contained in the Director's agenda minute.

B. The Union Organization Campaign

Kent is an Alabama corporation which manufactures and sells steel shelving and grocery checkout counters at its plant in Jefferson County, Alabama. On or about March 13, 1973, the International Boilermakers Union commenced a campaign to organize Kent's employees. These same employees were currently represented for purposes of collective bargaining by the Employees Association of Kent-Supermatic, an unaffiliated labor organization. A Labor Board conducted election was held on May 17, 1973 and resulted in 26 ballots for representation by the Boilermakers, 25 for the Association with 26 other bailots challenged by the parties. The result of this

election was not determined because the Boilermakers and certain Kent employees filed unfair labor practice charges against Kent.

C. The Disposition of the Unfair Labor Practice Charges

The Boilermakers filed unfair labor practice charges with the Board's Atlanta Regional Office against Kent in Board Case Nos. 10-CA-10077 and 10091. Charges filed by individual employees were numbered 10-CA-10099, 10179 and 10272. These charges alleged violations of certain provisions of the National Labor Relations Act . After an investigation, Donald E. Howard, the Board's Resident Officer in Birmingham, Alabama, wrote a Final Investigative Report which reviewed the charges and evidence collected in connection with them. On May 30, 1973, this report was the topic of conversation at a meeting attended by Donald Howard, two unidentified Board Regional Office attorneys, and Walter C. Phillips, Director of the Atlanta Regional Office. These persons orally discussed the Final Investigative Report section by section with respect to which allegations should be pursued and which should be dropped. Director Phillips and Resident Officer Howard made notes in the margins of their copies of the Final Investigative Report reflecting these dispositions.[2] Phillips filed his copy and it is no longer in existence. Howard gave his copy to Board attorney Donald W. Davis who drafted the complaint consolidating those allegations to be pursued. As a result of this agenda meeting, the Boilermakers were induced by the Board's Regional Office to withdraw entirely the charge in Case No. 10-CA-10077 and

[2] It is unclear whether the two Regional attorneys also made similar notations on their copies.

to amend the charge in Case No. 10-CA-10091. On June 20, 1973, the Regional Director issued a consolidated complaint which also included a new charge filed against Kent.

On July 11, 1973, a charge was filed against Kent in Board Case No. 10-CA-10272. Attorney Davis investigated the charge himself, and his Final Investigative Report was discussed at an agenda committee meeting on August 17, 1973, attended by Regional Director Phillips, Davis, and two other attorneys. Again Phillips orally indicated what allegations discussed in the report were to be included in a complaint to be drafted and Davis noted these directions in the margin of his copy of the report. On August 24, 1973, a "partial dismissal letter" was sent to the charging party, explaining why certain allegations were not being included in the complaint, which was issued on August 22, 1973.[3]

D. Kent Seeks Disclosure of the Final Opinions of the Regional Director with Respect to Charges Not pursued

On September 23, 1973, Kent requested the Board to disclose, *inter alia* the following documents:

> "5. The Final opinion or order of the Regional Director, or his authorized deputy or assistant, in Case Nos. [sic] 10-CA-1077, recommending to the charging party that it withdraw the charge in that case, and making the determination to dismiss the charge if not withdrawn; namely, the document referred to in Section 101.5 of the Board's Statement of Procedure with respect to that case.

[3] The Board later held that Kent violated the National Labor Relations Act as alleged in the complaints. *Kent Corp.*, 212 NLRB No. 88 (1975), *enfd*, 530 F.2d 610 (5th Cir. 1976).

> "6. Any documents incorporated by reference in any of the above documents."

When no response was received, Kent filed a complaint in the federal district court requesting the District Court to order the Board to disclose these documents pursuant to the Freedom of Information Act.

ORDERS AND DECISION BELOW

The District Court issued an injunctive order, on February 27, 1974 (App. pp. 32a-34a), concluding in pertinent part that "marginal notations on investigation reports by the Regional Director, and marginal notations by staff attorneys recording the oral directions of the Regional Director, are final decisions which are due to be revealed" (App. p. 33a). The District Court directed the Board to disclose to Kent those parts of the reports and marginal notations "which constitute the final decisions [of the Regional Director] . . . not to prosecute" (App. p. 34a). This order was limited to "the factual basis" for the decisions; the District Court holding that "conclusions and opinions and confidences with respect to the investigation are not due to be revealed" (App. p. 33a).

On appeal the Court of Appeals reversed (App. p. 5a). The Court of Appeals agreed with the District Court that Regional Directors, like the Board's General Counsel, possess and exercise law making powers, and that decisions made pursuant to this authority are "final opinions" within the meaning of § 552(a)(2)(A) of the Freedom of Information Act (App. p. 13a). The Court of Appeals, however, ruled that Final Investigative Reports were not "opinions" subject to

disclosure because "[t]hey state reasons that could account for (the) Regional Director's . . . decisions, but there is no assurance that [the Director] accepted those reasons" (App. p. 15a). The Court of Appeals further held that even if these Reports contained unambiguous notations of the basis for the Director's dispositions, disclosure would still not be mandatory because "[t]here would be no assurance that they represented the institutional view of the Regional Office" (App. pp. 15a-16a). Despite this holding, which imposed an impossible burden upon the party seeking disclosure, the Court of Appeals allowed that purely factual or objective material would be subject to disclosure but concluded that such severable material would be protected by the attorney work product privilege embodied in § 552(b)(5) of the Freedom of Information Act (App. pp. 21a-25a).

REASONS FOR GRANTING THE WRIT

The holding of the Court of Appeals encourages bureaucratic development of secret law by permitting the label of non-adoption to control the question of the public's right to know in controvention of express public policy embodied in the Freedom of Information Act. The ruling below also improperly imposes an insurmountable burden of proof upon the party seeking disclosure, without any legislative support. The Court of Appeals decision is contrary to decisions of this Court and at least one other circuit court of appeals. Because the decision raises important issues which vitally affect all private parties faced with legal proceedings conducted by federal agencies, review by the Court is warranted.

1. The Freedom of Information Act represents Congress' broad attempt to permit access to information heretofore unnecessarily concealed from public view and reflects Congressional concern that the public must have a judicially enforceable right to obtain this information from recalcitrant government officials. The Act was a reaction to the history surrounding Section 3 of the Administrative Procedure Act, 5 U.S.C. §1002 which, contrary to the intent of its sponsors, came to be regarded as a statute endorsing governmental secrecy rather than disclosure. Unlike the Administrative Procedure Act, the Freedom of Information Act eliminates the "properly and directly concerned" test for access to information and instead provides that official information shall be disclosed "to the public", "for public inspection". The Court has repeatedly reiterated that the Freedom of Information Act must be construed to make available the maximum information reasonably considered to be embraced within the ambit of that Act. *Dept. of Air Force* v. *Rose*, — U.S. —, 96 S.Ct. 1592, 1599 (1976); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 136-37 (1975); *EPA* v. *Mink*, 410 U.S. 73, 79-80 (1973). See also Davis, "The Information Act: A Preliminary Analysis", 34 U. Chi. L. Rev. 761, 797 (1967).

Section 552(a)(2)(A) specifically mandates disclosure of "final opinions . . . made in the adjudication of cases . . ." The Court of Appeals specifically recognized that dispositions of pending cases by a Regional Director are adjudications and possess the necessary element of finality required by this provision of the Freedom of Information Act, notwithstanding the possibility that an adjudication not to proceed in a

case might be reversed on the charging party's appeal. The Court of Appeals stated (App. p. 13a):

> The Regional Director, like the General Counsel in [*NLRB* v.] *Sears,* [*supra*] has power to make a final disposition of a claim by dismissing it. This is effective law-making power, and the thrust of subsection (a)(2) is toward allowing the public to know what "the law" is. (footnote omitted).

However, the Court of Appeals erroneously ruled that a Final Investigative Report which constituted, along with agenda minutes the *only* written reasons for the Director's adjudication were not opinions and thus no portion of these identifiable documents were disclosable because "there is no assurance that Phillips accepted those reasons." This reasoning permits federal agencies to blanket final dispositions of cases from all disclosure by the simple expedient of claiming that the written documents do not include all the reasons for the action and logically authorizes nondisclosure of documents when a single portion which may reflect another "reason for the decision" is lost or destroyed. There is no basis for the bifurcation of "final" and "opinion" in the legislative history of the Freedom of Information Act.

This ruling is contrary to the Court's decision in *NLRB v. Sears, supra.* Here, in the absence of a memorandum prepared by the Regional Director exploring the basis for his decision, the Final Investigative Report and the agenda minutes together are the only recorded basis for a "final disposition" not to proceed. Disclosure is required because (421 U.S. at 152-3):

> the public is vitally concerned with the reasons which did supply the basis for an agency policy

> actually adopted. These reasons, if expressed within the agency, constitute the "working law" of the agency and have been held by the lower courts to be outside the protection of Exemption 5.

Thus the Court has ruled (421 U.S. at 153) that such identifiable documents must be disclosed on demand and are not subject to any claim of privilege embodied in Exemption (b)(5) of the Freedom of Information Act:

> The affirmative portion of the Act [§ 552(a)(2)] represents an affirmative congressional purpose to require disclosure of documents which have "the force and effect of law (citation omitted). We should be reluctant to construe Exemption 5 to apply to the documents described in 5 U.S.C. § 552(a)(2); and with respect at least to "final opinions" which not only invariably explain agency action already taken or an agency decision already made, but also constitute "final disposition".

There can be quarrel here that the Regional Director's actions constitutes a "final disposition" of those portions of the charge upon which no complaint will be issued. To be sure the Final Investigative Report is prepared in advance of, rather than after, a final disposition. This Report, however, becomes a post-decisional document which represents the institutional view of the Region, when, as here, it becomes, by the reasonable presumption of adoption, the basis for excluding from the complaint those portions of the charge which are not going to be pursued. Thus, as a matter of operative reality, the Final Investigative Reports do "invariably explain agency action in closed cases".

The Court of Appeals' decision cannot be persuasively reconciled with *NLRB* v. *Sears, supra.*[4]

2. The decision below also imposes an insurmountable burden of proof upon a private party to demonstrate that a document is a final opinion within the meaning § 552(a)(2). Not only is there no basis in that provision or in the legislative history of the Act as originally enacted in 1966 or as amended in 1974 for such a burden, but such a requirement also contravenes § 552(a)(4)(B) which imposes upon the agency resisting disclosure the burden to justify its action.

Where, as here, a Final Investigative Report results in a disposition in favor of withdrawal or dismissal of proposed litigation, it should be presumed, absent affirmative evidence to the contrary, that the Report reflects the view of the Region. The imposition upon the Regional Director of this proof burden is fully consistent with the mandate expressed by Congress in § 552(a)(4)(B) and with the holdings of the Court (*infra,* p. 9) reflecting the Congressional policy in favor of public disclosure. The disclosure of the

[4] The Court of Appeals relied upon *Renegotiation Bd.* v. *Gruman Aircraft*, 421 U.S. 168 (1975). However, this reliance is misplaced, for there, unlike the decision making authority delegated to Regional Directors (and so found by the Court below), a division of the Regional Board in that case does not have the power "to make final dispositions" or the "legal authority to decide". 421 U.S. at 187, 189.

If the Court agrees with Kent that the documents requested are subject to the affirmative section of the Freedom of Information Act, there is no warrant for a remand for consideration of Exemption (b)(7). Congress has already resolved the question by declaring that this latter exemption does not apply to any documents within § 552(a)(2). Conference Report, H. Rept. No. 93-1380, 93d Cong. 2d Sess. (1974), Legislative History, Texts, and Other Documents 237-38 (March 1975).

Report together with the Region's action in the case—dismissal of the proceeding—will not only provide private litigants with information to knowledgeably litigate with the Regional Director, but also will forestall any intrusion in the analytical or deliberative process of Regional personnel.[5]

3. The decision below is also inconsistent with the ruling in *Ash Grove Cement Co.* v. *FTC,* 511 F.2d 815 (D.C. Cir. 1975). There as here, a company subject to an action before a federal agency sought agency documents compiled in the action. One category of documents requested included chronological minutes of the agency's executive meetings and conferences reflecting the agency's decision making process. The District of Columbia Circuit held that such "minutes are *prima facie* disclosable." 511 F.2d at 818. There is no operative difference between these minutes and the Final Investigative Reports and agenda minutes which also reflect the Regional Director's decision making process with respect to those portions of a complaint where no litigation is contemplated.

The Court of Appeals made no effort to reconcile or distinguish this contrary authority which unlike the decision below implements the legislative policy underlying policy of the Freedom of Information Act, which is to enable a private party to "deal effectively and knowledgeably with the Federal agencies." S. Rep. No. 813, 89th Cong., 1st Sess., 7 (1965). See also *NLRB v. Schill Steel Prods. Inc.,* 408 F.2d 803, 805 (5th Cir.

[5] When the Director fails to meet this burden, the party is entitled as a matter of law to the entire Final Investigative Report. However, in the instant case Kent seeks only the objective portions of these Reports, and not disclosure of personal comments and opinions of Regional personnel.

1969). Review is thus appropriate to resolve an issue now the subject of squarely contrary circuit court rulings.[6]

4. Assuming the Court disagrees with the burden of proof test suggested (*infra* p. 12), material contained in Final Investigative Reports pertaining to charges which are wholly or partially dismissed are nevertheless "identifiable records" which must be disclosed on demand. In such circumstances dismissal in effect, denies relief to the charging party entirely or on certain portions of a complaint. The Court held in *NLRB* v. *Sears, supra,* that agency documents which are not "final opinions" are nevertheless disclosable on demand if the document is identifiable and "one the agency chooses for its own reasons to create." 421 U.S. at 158, 155. The Court further held that the common law work product privilege embodied in Exemption (b)(5) does not apply because that portion of the case is closed. 421 U.S. at 155. This approach properly restricts the work product priviledge to material which expresses "the attorney's theory of the case and his litigation strategy" as opposed to "primary information, such as verbatim witness of objective data." Section 552(b) of the Freedom of Information Act mandates "reasonable segregation"

[6] The holding below also appears to contain inconsistencies. First, the Court of Appeals suggests that a final report not shown to represent the institutional view of the Regional office is wholly immune from disclosure (App. pp. 15a-16a). Second, and inconsistently, the Court suggests that primary information contained in these reports, such as verbatim witness testimony or objective data, is subject to disclosure (App. p. 24a). Finally, the Court of Appeals asserts that such objective data may well be protected by the work-product privilege (App. pp. 24a-25a). Review and clarification by the Court is necessary in order that persons litigating with the Regional Director may be clearly informed of their rights.

of portions of material which relate to those portions of the case subject to litigation. Federal District Courts by exercise of *in camera* inspection authorized in § 552(a)(4)(B) of the Act can safely be assumed to insure the appropriate deletions. *Dept. of the Air Force v. Rose, supra,* 96 S.Ct. at 1600; *EPA v. Mink, supra,* 410 U.S. at 91.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

GERARD C. SMETANA,
BOROVSKY, SMETANA, EHRLICH
& KRONENBERG
2011 "Eye" Street, N.W.
Suite 800
Washington, D. C. 20006

Attorney for Kent Corporation

July 1976

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1975

No. 74-1710

D. C. Docket No. CA73 M 1090

KENT CORPORATION, *Plaintiff-Appellee,*

versus

NATIONAL LABOR RELATIONS BOARD and JOHN H. IRVING, in his official capacity as General Counsel of the National Labor Relations Board, *Defendants-Appellants.*

Appeal from the United States District Court for the Northern District of Alabama

Before TUTTLE, GODBOLD and GEE, *Circuit Judges.*

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

It is further ordered that plaintiff-appellee pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

April 21, 1976

SUPREME COURT OF THE UNITED STATES

No. A-24

KENT CORPORATION, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

Order Extending Time To File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 29, 1976.

/s/ LEWIS F. POWELL, JR.
Associate Justice of the Supreme Court of the United States

Date this 16th day of July, 1976.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

April 21, 1976.

KENT CORPORATION, *Plaintiff-Appellee,*

v.

NATIONAL LABOR RELATIONS BOARD and John H. Irving, in his official capacity as General Counsel of the National Labor Relations Board, *Defendants-Appellants.*

No. 74-1710.

Appeal from the United States District Court for the Northern District of Alabama.

Before TUTTLE, GODBOLD and GEE, *Circuit Judges.*

GODBOLD, *Circuit Judge:*

This is a suit for disclosure of public records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552.[1] The documents in issue are "Final Investigation Reports" prepared by staff members of the NLRB's Tenth Regional Office after they investigated unfair labor practice charges filed against plaintiff Kent. Some of these reports contain marginal notations made by the Regional Director and his staff during a meeting at which they discussed the charges. Kent contends that these documents with their notations, insofar as they constitute decisions by the Regional Director not to issue an unfair labor practice complaint, are

[1] The Act was amended by Pub.L. 93-502, 88 Stat. 1564 (1974). Except where otherwise indicated, all citations to the FOIA in this opinion are to the amended statute.

disclosable under subsections (a)(2)[2] and (a)(3)[3] of the FOIA. The government contends that the materials are protected from disclosure by Exemptions 5 and 7[4] of the

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[2] 5 U.S.C. § 552(a)(2):

"Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which had been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. . . . Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter . . . required by this [subsection] to be made available or published."

[3] 5 U.S.C. § 552(a)(3):

"Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person."

[4] 5 U.S.C. § 552(b):

"This [Act] does not apply to matters that are . . . (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; . . ."

"(7) investigatory records compiled for law enforcement purposes, but only to the extent that production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal

Act. After an *in camera* inspection, the District Court ordered disclosure. We reverse.

I. The Origins of the Documents in Issue

Many of the issues in this case are governed by a recent Supreme Court decision applying the FOIA to the Board. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975) (hereinafter *Sears*). We thus find it apt to begin our discussion with background information quoted from that opinion:

> Under the Labor Management Relations Act of 1947, 29 U.S.C. § 151 et seq., the process of adjudicating unfair labor practice cases begins with the filing by a private party of a "charge," 29 U.S.C. §§ 153(d) and 160(b); 29 CFR § 101.2; *Auto Workers* v. *Scofield*, 382 U.S. 205, 219, 86 S.Ct. 373, 382, 15 L.Ed.2d 272 [281]; *NLRB* v. *Indiana and Michigan Electric Co.*, 318 U.S. 9, 17-18, 63 S.Ct. 394, 399-400, 87 L.Ed. 579 [585]. Although Congress has designated the Board as the principal body which adjudicates the unfair labor practice case based on such charge, 29 U.S.C. § 160, the Board may adjudicate only upon the filing of a "complaint"; and Congress has delegated to the Office of General Counsel "acting for the Board" the unreviewable authority to determine whether a complaint shall be filed. 29 U.S.C. § 153(d); *Vaca* v. *Sipes*, 386 U.S. 171, 182, 87 S.Ct. 903, 912, 17 L.Ed.2d 842 [853]. In those cases in which he decides that a complaint shall issue, the General Counsel becomes an advocate before the Board in support of the complaint. In those cases in which he decides not to issue a com-

---

law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel . . . ."

plaint, no proceeding before the Board occurs at all. The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that his claim is sufficiently meritorious to warrant Board consideration.

In order to structure the considerable power which the administrative scheme gives him, the General Counsel has adopted certain procedures for processing unfair labor practice charges. Charges are filed in the first instance with one of the Board's 31 Regional Directors, to whom the General Counsel has delegated the initial power to decide whether or not to issue a complaint. 29 CFR §§ 102.10, 101.8. A member of the staff of the Regional Office then conducts an investigation of the charge, which may include interviewing witnesses and reviewing documents. 29 CFR § 101.4. If, on the basis of the investigation, the Regional Director believes the charge has merit, a settlement will be attempted, or a complaint issued. If the charge has no merit in the Regional Director's judgment, the charging party will be so informed by letter with a brief explanation of the reasons. 29 CFR §§ 101.8, 102.15, 101.6, 102.19. In such a case, the charging party will also be informed of his right to appeal within 10 days to the Office of the General Counsel in Washington, D. C. 29 CFR §§ 101.6, 102.19.

421 U.S. at 138-39, 95 S.Ct. at 1510-1511, 44 L.Ed.2d at 40-41 (footnote omitted). Thus when the Regional Director believes that the charging party's position does not merit the filing of a complaint, that determination is final, subject only to the limited possibilities for intervention by the General Counsel's office. Such intervention led to

the writing of the documents at issue in *Sears*. In the present case, however, we are solely concerned with procedures at the Regional Offices, where nearly all cases are resolved without the participation of Washington officials.[5]

During the spring and summer of 1973, various unfair labor practice charges were filed with the Board's Tenth Regional Office in Atlanta against Kent. Some of the charges were filed by a labor organization and other charges by individual employees of Kent. Donald E. Howard, the Resident Officer in Birmingham, investigated the charges in three of the cases (Nos. 10-CA-10077, -10091, and -10099), interviewing witnesses and gathering documentary evidence. He then wrote a "Final Investigative Report" summarizing the evidence and recommending disposition of the charges. The report was discussed at a meeting on May 30, attended by Howard; the Regional Director, Walter C. Phillips; and two Regional Office attorneys. As the participants discussed the report, section by section, Phillips gave oral directions as to which alleged violations should be pursued (with a view towards settlement or complaint) and which should be dropped (by inducing a withdrawal of the charge, or by dismissal). Howard, Phillips, and possibly the other attorneys made notes in the margins of their copies of the report. Phillips filed his copy away;[6] Howard gave his to Donald W. Davis, an attorney in the Birmingham office, who drafted a complaint based on some, though not all, of the charges that had been discussed.[7] Before the complaint had been issued, an investigative report on another case (No. 10-CA-10179) was completed by a Board field examiner. Phillips decided that this charge had merit and directed that the cases

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[5] See note 15 *infra*.

[6] This document is no longer in existence.

[7] The remaining charges were withdrawn by the charging party a few days later, at Howard's suggestion.

should be consolidated. The ensuing complaint was issued on June 20.

Another charge was filed against Kent on July 11, and a similar sequence of events followed. Davis investigated and wrote a report on the allegations; he, Phillips, and other attorneys discussed it at an agenda committee meeting, where Phillips decided that some of the charges should be dismissed and other charges included in the complaint. Again both Davis and Phillips made notes on their copies of the investigative reports to reflect the decisions. Davis wrote a "partial dismissal letter" to the charging party, explaining why some of the allegations would not become the subjects of a complaint. At the same time, using his marked copy of the report, he drafted a complaint based on the remaining allegations. This complaint, consolidated with the previous one, was issued on August 22 and became the basis for subsequent litigation, culminating in *NLRB* v. *Kent Corp.*, slip opin. p. 2764, — F.2d — (C.A.5, 1976), a companion case to this one.

During the pendency of the unfair labor practice litigation, on September 24, 1973, Kent sent the Board a written request for documents, invoking the FOIA. Seven categories of records were requested, including the materials now in issue.[8] Upon receiving no response to the request,

[8] Kent requested the following records:

"1. The final opinion or order of the Regional Director or his authorized deputy or assistant, directing or authorizing the issuance of a complaint or complaints in Case Nos. 10-CA-10091, 10099, 10179 and 10272. See [D.C.] 346 F.Supp. [751] at 754 should there by [sic] any doubt as to the meaning of this item.

"2. The Regional Director's instructions to his staff to issue said complaint or complaints.

"3. The order or instructions to staff, of the Regional Director, or his authorized deputy or assistant, to suspend, delay or hold up on deciding the objections filed by the employer in Case No. 10-RC-9556.

"4. All advice or appeals memoranda or similar opinions, decisions or orders issued by the General Counsel of the NLRB in any of the above referenced cases, if there be any.

"5. The final opinion or order of the Regional Director, or his authorized deputy or assistant, in Case Nos. [sic] 10-CA-10077, recommending to the charging party that it withdraw the charge in that case, and making the determination to dismiss the charge if not withdrawn; namely, the document referred to in Section 101.5 of the Board's Statement of Procedure with respect to that case.

"6. Any documents incorporated by reference in any of the above documents.

"7. The index to advice and appeals memoranda in closed cases required to be kept by 5 USCA § 552(a)(2), and which was prepared during the pendency of the *Sears, Roebuck* case."

Kent filed suit in District Court on November 16, and moved for a preliminary injunction three days later.

In support of its motion, Kent set forth its reasons for wanting access to the materials. It alleged that the unfair labor practice investigation had pointed up

> arbitrariness and abuse of discretion on the part of Board agents. There were a number of individuals named in the unfair labor practice complaint as having been improperly discriminated against by plaintiff, on facts no different from numerous other individuals who were eliminated from the complaint by amendment or withdrawal approved by the Board. Plaintiff needs the documents . . . in order to determine the rational basis, if any, for selecting those individuals as to whom complaint was issued, since even after the hearing no discernible basis therefor exists.

Kent also claimed that "the investigation of the unfair labor practices was tainted by hostility [against Kent's president and its counsel], race prejudice, coercion or un-

due influence on witnesses, and entrapment." Kent hoped the documents would confirm the attitudes lying behind these alleged indications of improper conduct.

The District Court granted the preliminary injunction. Subsequently, on February 27, 1974, it denied the government's motion to vacate and directed the defendants to produce "those parts of the investigation reports and the marginal notes which constitute the final decisions to prosecute or not to prosecute." Defendants appeal from that order.

II. The FOIA—General Principles

The Freedom of Information Act has been discussed by this court several times before.[9] The Act "establish[es] a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S.Rep.No.813, 89th Cong., 1st Sess. 3 (1965). Thus, all federal agency records are prima facie disclosable to any member of the public who requests and "reasonably

[9] *See Continental Oil Co.* v. *FPC*, 519 F.2d 31 (C.A.5, 1975), *petition for cert. filed sub nom. Superior Oil Co.* v. *FPC*, 44 U.S.L.W. 3445 (U.S., Feb. 2, 1976) (No. 75-1094); *Stokes* v. *Brennan*, 476 F.2d 699 (C.A.5, 1973); *Wu* v. *National Endowment for Humanities*, 460 F.2d 1030 (C.A.5, 1972), *cert. denied*, 410 U.S. 926, 93 S.Ct. 1352, 35 L.Ed.2d 486 (1973); *Evans* v. *Department of Transportation*, 446 F.2d 821 (C.A.5, 1971), *cert. denied*, 405 U.S. 918, 92 S.Ct. 944, 30 L.Ed.2d 788 (1972); *NLRB* v. *Clement Bros. Co.*, 407 F.2d 1027 (C.A.5, 1969) (dictum). Documents like those involved in the present case were at issue in *Seafarers Int'l Union AFL-CIO* v. *Baldovin*, 508 F.2d 125 (C.A.5, 1975), but the controversy became moot before we had a chance to consider the merits. 511 F.2d 1161 (C.A.5, 1975).

Naturally the Board is not unfamiliar with the FOIA, either. For a collection of the case law, see Samoff & Falkin. *The Freedom of Information Act and the NLRB*, 15 B.C.Ind. & Com. L.Rev. 1267 (1974).

describes" them. § 552(a)(3).[10] If the materials are among those described by subsection (a)(2), including "final opinions . . . made in the adjudication of cases" and "instructions to staff that affect a member of the public," the agency has an additional duty: it must not only release the documents to the public, but also maintain and make available current indexes listing those materials. The agency can escape these responsibilities only if it sustains the burden of showing that the documents fall within one or more of the exemptions in subsection (b). Two such exemptions, those pertaining to intra-agency memoranda (Exemption 5)[11] and investigatory records (Exemption 7),[12] are said to apply in this case.

Sears is the preeminent precedent applying this Act to the NLRB. The plaintiff sought memoranda which the General Counsel had issued to the Regional Offices. These memoranda told Regional Directors how to dispose of certain cases and expressed reasons to justify those outcomes. The Supreme Court stated that Exemption 5 embodies at least two common-law privileges for government memoranda. First, it preserves in the FOIA context the "executive privilege" protecting predecisional communications because " 'frank discussion of legal and policy matters' in writing might be inhibited if the discussion were made public; and . . . the 'decisions' and 'policies formulated' would be the poorer as a result."[13] Second, Exemption 5 preserves the attorney work product privilege announced

[10] Before the 1974 amendments, corresponding language provided that a request for any "identifiable records" was sufficient. 5 U.S.C. § 552(a)(3) (1970).

[11] 5 U.S.C. § 552(b)(5).

[12] 5 U.S.C. § 552(b)(7).

[13] Similarly, we have said that the exemption "is designed to encourage the free exchange of ideas among government policymakers." *Stokes* v. *Brennan, supra*, 476 F.2d at 703.

in *Hickman* v. *Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). Accordingly, the Court held that memoranda of the General Counsel directing the filing of a complaint were exempt from disclosure, since they were work products, and, in any event, did not inform the public about agency law (since an adjudication of the charge was still to come). On the other hand, the Court held that "final opinions . . . made in the adjudication of cases," § 552 (a)(2)(A), are never within Exemption 5. The Court pointed out that the FOIA executive privilege had generally been deemed inapplicable to post-decisional documents such as "final opinions", since disclosure of communications made after a decision can hardly injure that decision, and also because the public is vitally interested in knowing the reasons for agency policy. The category of "final opinions," according to the Court, including memoranda by the General Counsel which explained decisions *not* to file a complaint. The Court said that such a memorandum accomplishes "as 'final' a 'disposition' as an administrative decision can—representing, as it does, an unreviewable rejection of the charge filed by the private party."

Kent now concedes, in light of *Sears*, that the District Court's order can no longer be sustained insofar as it required release of the Regional Director's decisions that a complaint should issue. But Kent vigorously maintains that under *Sears* the Regional Director's decisions *not* to issue a complaint are disclosable "final opinions." Thus, the questions before us are whether the investigative reports with their markings, or any portion thereof, are "final opinions," and, if not, whether they should be deemed outside of Exemption 5 for any other reason.

III. "Final Opinions"

We look first at the language of subsection (a)(2). Defendants do not deny that the Regional Office is an "agency" of the United States;[14] nor can they plausibly maintain after *Sears*, that the Regional Director's decisions were not reached in the "adjudication" of "cases." See 421 U.S. at 158-59, 95 S.Ct. at 1520, 44 L.Ed.2d at 51-52. We also believe that these decisions possess the "finality" demanded by subsection (a)(2)(A), notwithstanding the charging party's right to appeal a dismissal to the General Counsel's office in Washington. Paraphrasing apt language from *Sears*, 421 U.S. at 158-59 n. 25, 95 S.Ct. at 1520, 44 L.Ed.2d at 52 n. 25: "[T]he possibility that the decision reached" by the Regional Director "may be overturned in an Appeals Memorandum . . . does not affect its finality for our purposes. The decision . . ., in the absence of an appeal filed by the charging party has real operative effect, as much as does every order issued by a United States District Court which might, if appealed, be overturned by a United States Court of Appeals." The Regional Director, like the General Counsel in *Sears*, has power to make a final disposition of a claim by dismissing it. This is effective law-making power, and the thrust of subsection (a)(2) is toward allowing the public to know what "the law" is.[15]

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[14] *See Bayview Associates* v. *NLRB*, 88 L.R.R.M. 2331 (D.D.C., 1974) (by implication); *Automobile Club* v. *NLRB*, 84 L.R.R.M. 2423 (D.D.C., 1973), *aff'd mem.*, 162 U.S.App.D.C. 18, 495 F.2d 1074 (1974) (by implication).

[15] *See Stokes* v. *Brennan*, 476 F.2d 669 (C.A.5, 1973); Davis, *The Information Act: A Preliminary Analysis*, 34 U.Chi.L.Rev. 761, 770-72 (1967).

There is language in *Renegotiation Board* v. *Grumman Air-Craft Engineering Corp.*, 421 U.S. 168, 186-87, 95 S.Ct. 1491, 1501, 44 L.Ed.2d 57, 72 (1975), which could be read to suggest that an agency decision is not "final" unless the decision is owed some kind of deference by whatever authority reviews its conclusions, as opposed to being subject to de novo review. The Court's example of such deference was the "clearly erroneous" and "abuse of discretion" standards by which Courts of Appeals review certain District Court conclusions. The record before us

Despite these considerations Kent's argument has a fatal flaw: the materials at issue in this case are not "opinions." We are guided in this regard by *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 95 S.Ct. 1491, 44 L.Ed.2d 57 (1975), a companion case to *Sears*. In *Grumman* the plaintiff sought, *inter alia*, reports prepared by "Divisions" or subcommittees composed of three of the Renegotiation Board's five members. The full Board used these reports as a springboard for discussion in the course of deciding whether to require contractors to refund "excessive profits" to the government. The Court held that these division reports were not to be treated as final opinions of the Board. For after discussing a written memorandum's rationale, the Board

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does not indicate that a Regional Director's dismissal of a complaint carries any formal weight with the Appeals Branch. Yet we do not read *Grumman* as saying that the acid test of finality is whether a decision carries legal weight on appeal. There are many District Court conclusions which Courts of Appeals are bound to reconsider de novo. Moreover, we cannot close our eyes to the fact that as a practical matter the General Counsel's Office does tend to accept the judgments of Regional Directors. The General Counsel told a House subcommittee in 1961:

> "The Committee should bear in mind in this connection that the percentage of reversals (on the average about 6%) will necessarily be small since all of the cases on appeal have been subjected to careful evaluation at the Regional Office level by top-echelon field personnel, the great majority of whom have had long years of experience and proven integrity and ability, [which] provides a firm guarantee that the decision in every appeals case is made on the basis of a careful *de novo* evaluation and review [below] of the evidence disclosed by the field examination."

CCH Lab.L.Rep. ¶ 1150.05 at 3083. The Supreme Court in *Grumman* left open the possibility that "de facto decisional authority" could bear on the question of whether a final disposition is present. 421 U.S. at 185 n. 22, 95 S.Ct. at 1500, 44 L.Ed.2d at 71 n. 22. It is hard to deny that agencies which are sustained well over ninety percent of the time are actively participating in the creation of Board law.

might act for an entirely different reason; indeed, the individual author of the report might change his viewpoint after discussion and accept arguments quite different from the (possibly quite tentative) ideas he had expressed in writing. Echoing the philosophy of Exemption 5, the Court declared itself "unwilling to deprive the Board of a thoroughly uninhibited version of this valuable deliberative tool."

In the present case no document in controversy purports to explain why the Regional Director decided not to issue a complaint in the various instances. The "Final Investigation Reports" as originally written do not do so. They express the tentative views of the Birmingham attorneys who wrote them. They state reasons that could account for Regional Director Phillips' decisions, but there is no assurance that Phillips accepted those reasons. They are precisely the sort of predecisional documents that *Sears* identifies as the intra-agency memoranda mentioned in the FOIA. As we held in *Wu* v. *National Endowment for Humanities*, 460 F.2d 1030, 1032 (C.A.5, 1972), "advice, recommendations, opinions, and other subjective material are protected" by Exemption 5.

The further question is whether the presence of the notations made in the margins of these reports changes anything. Of course disclosure of the notations by themselves would be a futile endeavor, even assuming they are not exempt; apart from their context, they are gibberish. We understand Kent to argue, however, that the whole is greater than its parts—that these reports and their marginal annotations *together* (perhaps with the latter "incorporating by reference" the former) are "final opinions." We think they are not. From our *in camera* inspection of the documents, we can say that these ambiguous scribbles do not clearly show the basis of the decisions in question. But even if these markings were both coherent and lucid, the case could come out no differently.

There would be no assurance that they represented the institutional view of the Regional Office. Even Phillips' own copies of the reports might, for all we could tell, be inscribed with only some of the reasons behind his choice. And some of the points to be found in the margins might be tentative conclusions, put on paper only while he was on the way to making up his mind. *A fortiori*, we could depend on Davis' and Howard's copies of the reports to reveal only part of "the decision," not necessarily all of it. The copies would not—could not—show the extent (if any) to which the Regional Director conveyed his views by oral statements that were never recorded.

Under the District Court's order the agency would have had to comb through the reports and pick out those sentences or paragraphs which represented the ultimate basis of its actions; to articulate its reasoning more coherently and locically than the reports, and later the handwritten notes themselves did; in short, to *create* a final opinion. But "[t]he Freedom of Information Act imposes no independent obligation on agencies to write opinions. It simply requires them to disclose the opinions which they do write." *Grumman*, 421 U.S. at 192, 95 S.Ct. at 1504, 44 L.Ed2d at 75.[16]

The policies that Exemption 5 was meant to foster are illustrated, ironically, by Kent's own motives for seeking these documents. Kent claims that it needs access to the reports in order to determine whether Board personnel are hostile and prejudiced against its cause. Thus in the unfair

[16] Plaintiff raises no contentions concerning subsection (a)(2)(B), which directs the releasing and indexing of "statements of policy and interpretation which have been adopted by the agency," and thus we are not required to construe it. But, in view of the considerations we have just advanced, we would have serious reservations about any assertion that the Regional Office "adopted" these marked-up reports as policy. *Cf. Sterling Drug, Inc.* v. *FTC*, 146 U.S.App.D.C. 237, 450 F.2d 698 (1971).

labor practice litigation Kent is trying to probe the mental processes and motives of the individual decision-maker, rather than to question the objective legal validity of the institutional decision. In the circumstances of this case,[17] this effort is inconsistent with a basic principle administrative law. The Supreme Court announced the general bar against probing mental processes in the *Morgan* cases,[18] and decisions of this Circuit have held it applicable to NLRB prosecutorial processes.[19] The point is significant in construing Exemption 5,[20] which was enacted to free decision-makers from the "threat of cross-examination in a public tribunal," *Ackerly* v. *Ley*, 137 U.S.App. D.C. 133, 420 F.2d 1336, 1341 (1969); see *EPA* v. *Mink*, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973). In view of Kent's

[17] *See* note 21 *infra*.

[18] "It was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required." *Morgan* v. *U.S.*, 304 U.S. 1, 18, 58 S.Ct. 773, 776, 82 L.Ed. 1129, 1132 (1938). *See also U.S.* v. *Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 1004, 85 L.Ed. 1429, 1435 (1941); *Bank of Commerce of Laredo* v. *City National Bank of Laredo*, 484 F.2d 284, 287 (C.A.5, 1973), *cert. denied*, 416 U.S. 905, 94 S.Ct. 1609, 40 L.Ed.2d 109 (1974); *NLRB* v. *Sun Drug Co.*, 359 F.2d 408, 413 (C.A.3, 1966); K. Davis, Administrative Law Treatise § 11.05 (1958). On the relevance of the *Morgan* rule to Exemption 5, *see generally Montrose Chem. Corp.* v. *Train*, 160 U.S.App.D.C. 270, 491 F.2d 63 (1974).

[19] *See J. H. Rutter Rex, Mfg. Co.* v. *NLRB*, 473 F.2d 223, 231 (C.A.5), *cert. denied*, 414 U.S. 822, 94 S.Ct. 120, 38 L.Ed.2d 55 (1973); *Davis* v. *Braswell Motor Freight Lines, Inc.*, 363 F.2d 600, 604 (C.A. 5, 1966).

[20] We do not suggest that the documents are within Exemption 5 *because* of Kent's motives; "any person" has the same rights under the Act as any other person. § 552(a)(3); *EPA* v. *Mink*, 410 U.S. 73, 92, 93 S.Ct. 827, 838, 35 L.Ed.2d 119, 135; *Sears*, 421 U.S. at 143 n. 10, 95 S.Ct. at 1513, 44 L.Ed.2d at 43 n. 10. Rather we take advantage of the instant circumstances to point out the *general* problem with which the FOIA is concerned.

position, it is hardly speculative to say that decision-makers would be exposed to just such threats if intra-agency advice memoranda were generally held disclosable whenever they could arguably be viewed as "final opinions." "A court which does not consider probing mental processes part of its reviewing task will hardly read [Exemption 5's] language as requiring disclosure of documents for solely that purpose." [21]

We also cannot overlook the fact that one of the Regional Director's decisions not to issue a complaint was indeed expressed in an opinion. In Case No. 10-CA-10272 the charging party (the Boilermakers' Union) declined to withdraw the allegations that the Regional Director had disapproved. Consequently a letter of dismissal was issued, formally notifying the union that certain charges would not be pursued and explaining reasons for the deci-

[21] Pederson, *Formal Records and Informal Rulemaking,* 85 Yale L.J. 38, 84 (1975).

There are circumstances in which the *Morgan* ban on probing mental processes of agencies does not apply: most notably, where a "strong [preliminar.] showing of bad faith or improper behavior" has been made. *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 420, 91 S.Ct. 814, 825, 28 L.Ed.2d 136, 156 (1971); *see also KFC National Management Corp.* v. *NLRB,* 497 F.2d 298 (C.A.2, 1974); *Singer Sewing Machine Co.* v. *NLRB,* 329 F.2d 200 (C.A.4, 1964); *S. D. Warren Co.* v. *NLRB,* 342 F.2d 814, 816-17 (C.A.1, 1965), *cert. denied,* 383 U.S. 958, 86 S.Ct. 1222, 16 L.Ed.2d 300 (1966). But, as Pederson continues, "[t]he bad faith or improper conduct exception to the protection afforded by *Morgan* in judicial review has not yet been read into the . . . exemption." 85 Yale L.J. at 84. In this case we need not decide the somewhat different question of whether a substantial showing of agency bad faith, of a kind that normally would make pre-decisional documents "available by law to a party other than an agency in [civil] litigation with the agency," § 552(b)(5), will also make those documents available to "any person" through the FOIA. For here Kent's charges of impropriety were simply too flimsy to meet the *Overton Park* standard. *NLRB* v. *Kent Corp.,* slip opin. p. 2764, — F.2d — (C.A.5, 1976).

sion. It was drafted by Howard and signed by the then Acting Regional Director. Here was a document that was truly post-decisional and did enunciate a basis for the agency's conclusion. Had an appeal been taken to Washington, this letter would have expressed to the General Counsel the Regional Office's view of the matter. When laid against this opinion, the marked-up investigation reports appear all the more clearly to be "predecisional." [22]

IV. "Instructions to Staff"

We turn briefly to the question of whether these documents are made disclosable by subsection (a)(2)(C), under which agencies must release and index "administrative staff manuals and instructions to staff that affect a member of the public." [23] On a first reading of the statute it might be quite tempting to describe the Birmingham attorneys' handwritten records of Phillips' directions as "instructions to staff." Moreover, in *Stokes* v. *Brennan,* 476 F.2d 699 (C.A.5, 1973), this court adopted a broad reading of subsection (a)(2)(C). We noted from the legislative history that Congress had added the adjective "administrative" in order to limit the scope of this provision, but that only "'information which, if known to the public, would *signifi-*

[22] This does not mean that the result would differ if no letter had been written. Indeed, in Case Nos. 10-CA-10077 and -10091 the Board successfully solicited the charging party to withdraw certain charges, and thus no document was released explaining these decisions not to issue a complaint. We mention the letter only because it clarifies the role of the Final Investigation Report in the particular instance involved.

[23] Kent's complaint, which made a specific demand for staff instructions (*see* note 8, *supra*), can fairly be read as putting subsection (a)(2)(C) into issue. We note, however, that we can consider this provision only as it relates to the materials the District Court ordered disclosed. Kent did not cross-appeal from the District Court's failure to order release of the other documents.

cantly impede the enforcement process' " was thereby excluded.

However, we need not decide whether the materials in controversy fall within this subsection. As previously suggested and as further discussed below, these reports are the kind of memoranda covered by Exemption 5; and, in any collision between the two provisions, subsection (a)(2)(C) must yield, because the Act "does not apply" to exempted material. § 552(b); *Sears*, 421 U.S. at 154 n. 21, 95 S.Ct. at 1518, 44 L.Ed.2d at 49 n. 21. Thus we can narrow our consideration to the question of whether "instructions to staff" automatically fall outside of Exemption 5. Such an interpretation might be suggested by the following language from *Sears:* "We should be reluctant . . . to construe Exemption 5 to apply to the documents described in 5 U.S.C. § 552(a)(2); and with respect at least to 'final opinions' . . . we hold that Exemption 5 can never apply."

Several factors prompt us to hold that, unlike the situation with final opinions, a document's status as "instructions to staff" under subsection (a)(2)(C) does not determine whether the document is within Exemption 5. First, despite its expressed "reluctance," the Supreme Court implicitly held in *Sears* that there is some overlap between the two statutory provisions: for it found that the work-product privilege brought certain memoranda into the exemption "whether or not" those memoranda were also "instructions to staff." Second, the conclusion we reach is consistent with our analysis in *Stokes*, where we treated subsections (a)(2)(C) and (b)(5) as raising entirely different technical issues. Third, a different conclusion would undercut the fifth exemption. "Predecisional" processes will quite regularly involve instructions to staff in the literal sense—if only an "instruction" to prepare a formal expression of the agency's views—and yet disclosure of those instructions would obviously tend to impinge on the deliberative process.

V. "Available by Law in Litigation"

Thus far we have expressed the view that these documents are not within subsection (a)(2); in operational terms we have concluded that the Regional Office's "final investigation reports," with or without marginal notes, do not have to be indexed. We next consider whether, and how far, Exemption 5 shields these records from the purview of the general disclosure provision, subsection (a)(3). As we have already made clear, the reports contain analyses and recommendations that are protected by the executive privilege within Exemption 5. It does not necessarily follow, however, that the reports may be withheld in their entirety. We must determine whether they contain any "reasonably segregable portion" that is not within any exemption. § 552(b). And it is now established that the executive privilege does not protect "purely factual material appearing in [requested] documents in a form that is severable without compromising the private remainder of the documents." *EPA* v. *Mink*, 410 U.S. 73, 91, 93 S.Ct. 827, 838, 35 L.Ed.2d 119, 134 (1973). If only executive privilege were claimed, it might be necessary to remand the cause for dissection and partial release of the reports.[24]

But the Board's contentions are broader. We must "construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context," *Sears*, 421 U.S. at 149, 95 S.Ct. at 1515, 44 L.Ed.2d at 46, and the Board relies on three distinct privileges here: the executive privilege, the attorney work product privilege, and (apparently) the so-called informer's privilege.[25]

We can dispose of the problem at hand by applying the work product privilege alone. Apart from the Supreme

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[24] *See* note 30 *infra.*

[25] On the scope of the informer's privilege in civil litigation, see our recent discussion in *Hodgson* v. *Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303 (C.A.5, 1972).

Court's cautious discussion in *Sears,* this is a rather unexplored corner of FOIA law, and it is therefore necessary to deal with some basics. The fundamental principles, of course, come from *Hickman* v. *Taylor,* 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), where the Court said, in part:

> In performing his various duties, . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. . . Were [work product] materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

329 U.S. at 510-11, 67 S.Ct. at 393-394, 91 L.Ed. at 462. More concisely we have said that the rule is "based on the public policy of preserving the independence of lawyers through the avoidance of unwarranted intrusion into their private files and mental processes." *Southern Ry.* v. *Lanham,* 403 F.2d 119, 126 (C.A.5, 1968). And " 'since the litigants before the Labor Board are legion, the evil of harassment * * * is correspondingly multiplied. The function of deciding controversies might soon be overwhelmed by the duty of answering questions about them.' " *Davis* v. *Braswell Motor Freight Lines, Inc.,* 363 F.2d 600, 604 (C.A.5, 1966).

Of course, the fact that an agency document was written by a lawyer does not necessarily make it "work product." The executive branch of our government employs an uncountable and ever-growing number of attorneys, and the

Act can hardly be understood as protecting everything they put on paper. In the federal courts the privilege may be invoked only for materials "prepared in anticipation of litigation or for trial." Fed.R.Civ.P. 26(b)(3). This is a phrase that must be interpreted with caution, and the case law affords relatively little guidance.[26] To say that the investigation reports in this case were prepared in anticipation of litigation is not without difficulties, because they were written at the very outset of the Regional Office's involvement in the case, before there had been any authoritative determination that the charges had substance. But there are weighty considerations on the other side. Where unfair labor practices are concerned, the Regional Office's basic function is to litigate. Moreover, Davis and Howard could not have known when they wrote their reports which cases Phillips would want dismissed. Their written evaluations of the evidence necessarily were founded on the assumption that any given charge *might* become enmeshed in litigation. Insofar as the privilege is meant to promote candid expressions of an attorney's theories and perspectives, it cannot properly be made to turn on whether litigation actually ensued.[27] Since "the prospect of litigation [was] identifiable because of specific claims that [had] already arisen," *Stix Prods., Inc.* v. *United Merchants & Mfrs., Inc.,* 47 F.R.D. 334 (S.D.N.Y. 1969), the reports are subject to a prima facie valid claim of privilege. These documents are quite different from the memoranda which

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[26] *See, e. g., Burlington Industries* v. *Exxon Corp.,* 65 F.R.D. 26, 42-43 (D.Md. 1974); *Garfinkle* v. *Arcata Nat'l Corp.,* 64 F.R.D. 688 (S.D.N.Y. 1974); *Stix Prods., Inc.* v. *United Merchants & Mfrs., Inc.,* 47 F.R.D. 334 (S.D.N.Y. 1969). See also 8 Wright & Miller, Federal Practice & Procedure § 2024 (1970).

[27] *Cf. Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz,* 509 F.2d 730 (C.A.4, 1974) (en banc), *cert. denied,* 420 U.S. 997, 95 S.Ct. 1438, 43 L.Ed.2d 680 (1975) (privilege does not necessarily terminate at close of litigation for which materials were prepared).

were held disclosable (and thus, by implication, not work products) in *Sears,* because the latter were not composed until after an authoritative decision to dismiss had been reached.

In an ordinary civil suit we would next go on to consider whether the claim was outweighed by the opposing litigant's evidentiary needs,[28] but in an FOIA suit the plaintiff's needs cannot be considered, since all members of the public have equal rights under the Act.[29] Instead the question is whether any reasonably segregable portion of the documents remains after the parts protected by work-product policies are determined. In our view, even the factual matters in these reports (which might not be protected by executive privilege) are protected by the work-product privilege. Writing in contemplation of forthcoming unfair labor practice litigation, an attorney must be able not only to discuss doctrinal theories but also to "assemble information, [and] sift what he considers to be the relevant from the irrelevant facts" without feeling that he is working for his adversary at the same time. *Hickman* v. *Taylor,* 329 U.S. at 511, 67 S.Ct. at 393, 91 L.Ed. at 462. The feeling would be well justified if we allowed the FOIA to be used to force disclosure of such materials.

This case is a particularly strong one for recognizing the privilege. The contents of the reports are not primary information, such as verbatim witness testimony or objective data, but rather are mainly reports on how the Birmingham attorneys appraised the evidence they found. Thus the reports consist largely of "mental impressions, conclusions, opinions, [and] legal theories" within the meaning of the Federal Rule. Such materials, if prepared in anticipation of litigation or for trial, are always pro-

[28] *See* Fed.R.Civ.P. 26(b)(3); *J. H. Rutter Rex Mfg. Co.* v. *NLRB, supra,* 473 F.2d at 234-35.

[29] *See* note 20, *supra.*

tected by a properly-raised claim of work product privilege, regardless of the opposing litigant's need.

We do not hold that the "Final Investigation Reports" of NLRB Regional Offices are always wholly within the attorney work-product privilege. In a closer case the District Court might be obliged to consider, possibly through *in camera* proceedings or the taking of extrinsic evidence,[30] whether any portions of the records could be disclosed without offending work-product rule policies.[31] But our examination of these documents convinces us that they are protected in their entirety by Exemption 5. Thus we have no occasion to pass on the government's alternative contention that the reports are within Exemption 7.

Reversed.

[30] In order to make consideration of FOIA claims both thorough and efficient, courts should be prepared to employ a judicious blend of affidavit, oral testimony, and *in camera* inspection. *EPA* v. *Mink,* 410 U.S. 73, 92-94, 93 S.Ct. 827, 838, 35 L.Ed.2d 119, 135-36 (1973); *see generally* Comment, *In Camera Inspections Under the Freedom of Information Act,* 41 U.Chi.L.Rev. 557 (1974). With regard to situations in which a defendant agency contends that a massive set of requested records contains no reasonably segregable, nonexempt portions, the District of Columbia Circuit has held that a District Court has discretion to require the agency to prove its claim by a detailed, section-by-section analysis of the material. *Vaughn* v. *Rosen,* 157 U.S.App.D.C. 340, 484 F.2d 820 (1973), *cert. denied,* 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

[31] *Cf. Southern Ry.* v. *Lanham, supra,* 403 F.2d at 133.

U.S. DISTRICT COURT,
NORTHERN DISTRICT OF ALABAMA

No. 73-M-1090

KENT CORPORATION

v.

NATIONAL LABOR RELATIONS BOARD, and NASH, etc.
December 26, 1973, and February 27, 1974

Order

McFADDEN, Chief Judge:—In conformity with the Findings of Fact and Conclusions of Law entered contemporaneously herein, it is:

ORDERED, ADJUDGED and DECREED by the Court that upon the plaintiff's filing a bond with the Clerk with good and sufficient surety approved by the Clerk in the Amount of One Hundred Dollars ($100) and conditioned as required by Rule 65 of the Fed. R. Civ. P., defendants, their agents, servants and representatives be and each of the hereby are enjoined and restrained during the pendency of this civil action or until further order of the Court from failing or refusing to produce for inspection and copying by the plaintiff any and all documents in their possession, custody or control described as follows:

1. The final opinion or order of the Regional Director of the Tenth Region, NLRB, or his authorized deputy or assistant, directing or authorizing the issuance of a complaint or complaints in Case Nos. 10-CA-10091, 10099, 10179 and 10272. This item includes any and all investigative reports or documents embodying recommendations to said Regional Director with respect to his final action in the matter of issuing such complaints which bear any marginal notations or similar writings evidencing final instructions

for the preparation of such complaints or refusal to issue complaints. Plaintiff is entitled to production of the marginal notations together with the corresponding paragraphs, sentences or recommendations to which they refer; however, portions of any such report which are not incorporated by reference into marginal notations may be deleted and are not required to be produced.

2. The Regional Director's instructions to his staff to issue said complaint or complaints.

3. The order or instructions to staff, of the Regional Director, or his authorized deputy or assistant, to suspend, delay or hold up on deciding the objections filed by the plaintiff in Case No. 10-RC-9556.

4. The final opinion or order of the Regional Director, or his authorized deputy or assistant, in Case Nos. 10-CA-10077, recommending to the charging party that it withdraw the charge in that case, and making the determination to dismiss the charge if not withdrawn; namely, the document referred to in Section 101.5 of the Board's Statement of Procedure with respect to that case.

5. Any documents incorporated by reference in any of the above documents.

6. The index to advice and appeals memoranda in closed cases required to be kept by 5 USCA § 552(a)(2).

It is further ORDERED that said documents be made available to plaintiff for inspection and copying within ten days from this date.

It is further ORDERED that copies of this preliminary injunction be served forthwith upon defendants in the same manner that the summons, complaint, motion for preliminary injunction and notice of the hearing of said motion were served upon defendants in this action.

FINDINGS OF FACT

This cause duly came on to be heard on the plaintiff's verified motion for preliminary injunction at 10 o'clock A.M. on December 18, 1973. There was no appearance for defendants although defendants had notice of the hearing. The Court having considered the verified motion, affidavit, and the pretrial brief of the plaintiff, is of the opinion that plaintiff is entitled to the relief herein granted and makes the following findings of fact:

1. Plaintiff is a corporation organized and existing under the laws of the State of Alabama and has its principal office and place of business on Pinson Highway, Birmingham, Alabama.

2. Defendant National Labor Relations Board (hereinafter the Board) is an agency of the United States Government established by § 3(a) of the Labor-Management Relations Act, 29 U.S.C.A. § 153(a). Defendant Peter G. Nash, who is made a defendant herein in his official capacity, is and has been at all material times General Counsel of the Board, which is an agency of the United States Government established by § 3(d) of the Labor-Management Relations Act, 29 U.S.C.A. § 153(d).

3. On or about September 24, 1973 plaintiff sent to defendant Nash, as General Counsel of the Board, in Washington, D. C., a written request for the inspection and copying of records described as follows:

1. The final opinion or order of the Regional Director or his authorized deputy or assistant, directing or authorizing the issuance of a complaint or complaints in Case Nos. 10-CA-10091, 10099, 10179 and 10272. See 346 F.Supp. at 754 should there be any doubt as to the meaning of this item.

2. The Regional Director's instructions to his staff to issue said complaint or complaints.

3. The order or instructions to staff, or the Regional Director, or his authorized deputy or assistant, to suspend, delay or hold up on deciding the objections filed by the employer in Case No. 10-RC-9556.

4. All advice or appeals memoranda or similar opinions, decisions or orders issued by the General Counsel of the NLRB in any of the above referenced cases, if any there be any.

5. The final opinion or order of the Regional Director, or his authorized deputy or assistant, in Case Nos. 10-CA-10077, recommending to the charging party that it withdraw the charge in that case, and making the determination to dismiss the charge if not withdrawn; namely, the document referred to in Section 101.5 of the Board's Statement of Procedure with respect to that case.

6. Any documents incorporated by reference in any of the above documents.

7. The index to advice and appeals memoranda in closed cases required to be kept by 5 USCA § 552(a)(2), and which was prepared during the pendency of the Sears, Roebuck case.

4. Defendants received that written request on or about October 2, 1973.

5. On or about October 19, 1973 plaintiff sent a telegram to defendant Nash reading as follows:

Honorable Peter G. Nash, General Counsel
National Labor Relations Board
Washington, D. C.

Re: Kent Corporation and International Brotherhood of Boilermakers, Case Nos. 10-CA-10091, 10097, 10179, 10272; 10-RC-9556.

Dear Mr. Nash:

Your attention is called to my letter addressed to you dated September 24, 1973 to which I have received no reply

although it was delivered several weeks ago. My client needs the documents listed in the letter for use in the above cases, the record in which has been kept open for possible introduction of these items as evidence. Our brief to Administrative Law Judge is due November 2 and we need these documents promptly. We believe we are clearly entitled to them under the Freedom of Information Act. Please let me hear your reply in the next few days.

C. V. Stelzenmuller
Attorney for Kent Corporation

6. Plaintiff received no reply to its letter nor its telegram until December 4, 1973, when representatives of defendants telephoned plaintiff's attorney and asked if he had not received a letter dated October 23, 1973, to which he replied in the negative. Thereupon a copy of the following letter was read to plaintiff's attorney:

C. V. Stelzenmuller, Esquire
Thomas, Taliaferro, Forman, Burr and Murray
16th Floor
Bank for Savings Building
Birmingham, Alabama 35203

Dear Mr. Stelzenmuller:

This is in response to your letter of September 24, 1973, requesting certain documents concerning Kent Corporation and International Brotherhood of Boilermakers, Case Nos. 10-CA-10091, 10099," 10170, and 10272, and 10-RC-9556.

As regard the documents requested in your items 1, 2, and 3, there are no written memoranda recording or implementing the case actions described.

There are no memoranda from the Division of Advice of the Office of Appeals concerning any of these cases since they were neither submitted for advice nor the subject of an appeal from the regional director's refusal to issue a complaint on any of the charges.

The communications concerning withdrawal of the charge in lieu of dismissal in Case 10-CA-10077 are also not implemented or recorded by written memoranda. The determination to dismiss the charge if not withdrawn was communicated to the charging party orally and the only documentation emanating from the regional office is the letter of the regional director approving withdrawal of the charge.

The index to advice and appeals memoranda which you requested should be available for your inspection and copy in the Birmingham regional office. Please contact the resident officer there who will make it available to you.

Sincerely yours,

John S. Irving
Deputy General Counsel

cc: Walter C. Phillips, Director NLRB Region 10
bcc: M. Taylor Brissman Weinbrecht/lgb
(10-17-73)

7. The Court finds that the response to plaintiff's request is inadequate. The records sought by plaintiff are needed by it for use as evidence, or to discover other evidence, in the several proceedings involving it, now pending before the Regional Director and the Administrative Law Judge of the NLRB. The Court finds that unless a preliminary injunction is issued the plaintiff will suffer irreparable injury for which it has no adequate remedy at law.

On the basis of the foregoing findings, the Court makes the following

CONCLUSIONS OF LAW

1. Defendants are each agencies within the meaning of 5 U.S.C.A. §§ 551(1) and 552.

2. The Regional Director, Tenth Region, National Labor Relations Board is an agency of the United States Gov-

ernment within the meaning of the Freedom of Information Act, 5 U.S.C.A. § 552(a). The Regional Director is under the supervision of defendant Nash.

3. Jurisdiction of this action is based on the Freedom of Information Act, 5 U.S.C.A. § 552(a)(3). Venue is proper under that statute as well as under 28 U.S.C.A. § 1391(e)(4).

4. The records sought by plaintiff are the type of identifiable records it is entitled to have produced for its inspection and copying, as a member of the public, under the Freedom of Information Act, 5 U.S.C.A. § 552.

5. Plaintiff is entitled to a preliminary injunction as hereinafter granted.

ORDER

This matter came on to be heard on the motion of the defendants to vacate the injunction and to dismiss the complaint.

The Court heretofore entered an order requiring the defendant to produce certain information. The defendant has now moved to vacate this injunctive order on the grounds that they have complied with the Court's order and the Freedom of Information Act by producting such final opinions, orders and instruments to staff affecting a member of the public, and documents incorporated therein by reference, as exist in the above captioned case.

It is evident that the defendant has not complied with the Court's order states that the defendants are enjoined from failing to produce:

> The final opinion or order of the Regional Director of the Tenth Region, NLRB, or his authorized deputy or assistant, directing or authorizing the issuance of

> a complaint or complaints in Case Nos. 10-CA-10091, 10099, 10179 and 10272. This item includes any and all investigative reports or documents embodying recommendations to said Regional Director with respect to his final action in the matter of issuing such complaints which bear any marginal notations or similar writings evidencing final instructions for the preparation of such complaints or refusal to issue complaints. Plaintiff is entitled to production of the marginal notations together with the corresponding paragraphs, sentences or recommendations to which they refer; however, portions of any such report which are not incorporated by reference into marginal notations may be deleted and are not required to be produced.

Paragraph 1 of the order of 26th December, 1973.

The Court is of the view that a final determination by the Regional Director with respect to the issuance of complaint is due to be disclosed under the Freedom of Information Act. Certain documents have been submitted to the Court for an *in camera* inspection, including certain investigations by the Regional Director, and by staff attorneys recording oral instructions of the Regional Director. The Court is of the opinion that marginal notations on investigation reports by the Regional Director, and marginal notations by staff attorneys recording the oral directions of the Regional Director, are final decisions which are due to be revealed. Accordingly, the Court is of the opinion that the defendant is due to reproduce and produce for inspection by the plaintiff that part of the investigation reports and the marginal notations which form the basis for the Regional Director's final decision. The Court is of the further opinion, however, that conclusions and opinions and confidences with respect to the investigation are not due to be revealed. It is merely the

factual basis on which the decision was based which must be revealed to the plaintiff.

Accordingly, the motion to vacate the Court's injunctive order is overruled and the defendant is directed to reproduce those parts of the investigation reports and the marginal notes which constitute the final decisions to prosecute or not to prosecute and to submit them to the plaintiff and the Court; copies of the original documents are to be submitted to the Court in order that it may monitor compliance with this order.